Supreme Court, U.S.
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No. 94-1146

In The

Supreme Court of the United States

October Term, 1994

WILLIAM WALSH,

Petitioner,

vs.

SOUTHWEST FLAGLER ASSOCIATES, INC.,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, SOUTHWEST FLAGLER ASSOCIATES, INC. (hereinafter Southwest Flagler), respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks review of the District Court of Appeal of Florida, Third District of Florida's *per curiam* affirmance in this case. The decision is reprinted in Petitioner's Appendix (A-1) and is reported at 641 So. 2d 81 (Fla. 3d D.C.A. 1994).

STATUTES INVOLVED

Respondent does not believe that there are any federal constitutional provisions, statutes or regulations involved in this case.

STATEMENT OF THE CASE

Petitioner, represented by counsel, filed suit against Southwest Flagler in October, 1990, alleging negligence in a trip and fall accident at Respondent's dog track on November 18, 1989. In October, 1991, Walsh's counsel moved to withdraw and the motion was granted. Thereafter, Walsh proceeded pro se. The case was tried over the five-day period July 20-24, 1992, and resulted in a jury verdict for Respondent. Walsh appealed the judgment to the District Court of Appeal, Third District of Florida, which affirmed in a *per curiam* opinion (A-1). A motion for rehearing was denied (A 2-3).

STATEMENT OF THE FACTS

On November 18, 1989, Walsh, his wife and daughter were at the Respondent's dog track, known as the Flagler Dog Track. They arrived at approximately 7:15 p.m. and went up to the clubhouse dining room for dinner. The dining room is tiered so that one level of tables is higher than the other, to permit the patrons to look out and view the dog races. Patrons enter at the top level where the betting windows, a bar and the maitre'd's station are situated. Steps lead down from that level to the five tiers where the tables are situated. There are four steps between each tier. Mrs. Walsh testified that they were seated on the third, or middle level, in the dining room. She said that her husband ordered dinner, and, as was his custom, then left for about a half hour to look at the dogs in the paddock area and place his bets for the night. She said their dinner had arrived, but that he still had not returned to the table. She looked up toward the top of the restaurant to see if he was returning and said that she saw him at the top of the stairs when suddenly he disappeared. She claimed that she had no knowledge of an alleged incident approximately 15 to 25 minutes before Petitioner fell, where two waiters carrying trays of food and drink collided on either the top level or

the first tier, spilling food and drink. When she went up the steps to reach her husband after the fall, she did not see any debris on the stairs.

Walsh himself admitted that "what caused me to fall I have no idea." He further admitted that he saw nothing on the floor or step that would have caused the fall. He conceded that it was possible that he tripped over his own feet. And, since he had been gone a half hour he, of course, could not have any knowledge about the two waiters supposedly colliding.

Ben Geller confirmed that he was in the dining room on Saturday evening, November 18, 1989. He was the only witness who testified about two waiters colliding. He said that after the collision the two waiters, plus three bus boys, cleaned up the area. He said that Walsh fell in the same area as the collision some 15 to 25 minutes afterwards. Geller admitted that he didn't inspect the area after waiters and bus boys cleaned up the spill, nor did he inspect the stairs where the collision occurred and did not know if there was anything on the floor after the area had been cleaned.

Disputed medical testimony was presented concerning Walsh's injuries which he claimed were a result of the fall. It was undisputed that he did not see any medical provider from the night of the incident on November 18, 1989 until he saw an orthopedic surgeon on January 31, 1990, some ten weeks later. Dr. Joseph Kalbac, retained by the defense to conduct an independent medical examination, testified that Walsh suffered a strained knee as a result of the accident. The arthroscopic surgery that Walsh had post-accident in November, 1991 was the result of a long term arthritic, degenerative condition.

Walsh attempted to relate an April, 1991, surgical procedure to his abdominal area to correct a hernia condition to the accident. The trial court refused to permit the doctor who performed the

surgery to testify because the doctor stated that she could not testify within a reasonable degree of medical probability that the accident at issue was causally related to the surgery she performed:*

> THE COURT: So if I ordered you, not withstanding the VA instructions, to give us your opinion on whether there is causal relationship between the surgery that you did and the accident I gather that what you would say is that I cannot tell you within reasonable medical probability, meaning that there is greater than 50 percent probability that the surgery was caused by the accident. Is that a fair statement of where you are?
>
> THE WITNESS: Yes.
>
> THE COURT: Mr. Walsh, when we get to that point this doctor even if permitted to testify fully would not be able to give testimony that would support the admission into evidence of her testimony about the surgery because she cannot supply, even if I ordered her to testify over VA objections, she cannot testify to the threshold that you have to raise above to make her testimony admissible. So she is not going to able to

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* The doctor performed the surgery while employed at a Veteran's hospital. Accordingly, she had been told by the Veterans Administration that as a federal employee she was not to render any opinions as to cause and effect but to only testify as a fact witness. However, since she did not have an opinion within a reasonable degree of medical probability, the issue of her not providing such an opinion was rendered moot.

testify unless you have some other expert witness who can come in and say that the surgery that was done by this doctor was caused by the accident that you had.

MR. WALSH: I don't even know that. I am not looking for that. I am being misunderstood here. I understand what you are saying. I don't care whether she wants to give the opinion or anything. The only thing I want her to do is say that on 4-9 on such and such a date that she gave me surgery for ventral hernia. Mallec mesh was used to close the incision. I wouldn't even.

THE COURT: She can't even testify to that because there is nothing in the record to show that her surgery and the use of mallec mesh was causally related to the accident that you had at Dogtrack.

MR. WALSH: What do you call a third party defendant? I thought you mean to tell me if this be true, the third party defendant, the first one that operated on me shouldn't be here.

THE COURT: That is another complication that I am not prepared to get into. We are here to try a lawsuit. We need to finish trying this lawsuit so you can get on with your life and Mr. Valerius can get on with his other cases.

MR. WALSH: Can I bring in my own, she knew right there in that she made a decision to operate on me on March 29.

> THE COURT: She made that decision. She didn't do it because you fell down at the Flagler Dogtrack and she can't testify to that, which makes her testimony in admissible [sic].

Mr. Walsh complains that though he could not call Dr. Gahtan to the stand, the defense was permitted to refer to his stomach surgery. This is merely an instance of a pro se Plaintiff not understanding the rules of evidence. Since Walsh was claiming substantial lost wages for the time he was out of work because of this accident, he clearly opened the door for the defense to show that he had stomach surgery, unrelated to this accident, and that the stomach surgery was the cause of his missing time from work. There was no error or any impropriety concerning this portion of the trial.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari to this Court must be denied as none of the issues the Petitioner addresses to this Court have any support in the law.

28 U.S.C. § 1257 provides:

> State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant

> to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or nay commission held, or authority exercised under, the United States.

It is apodictic that this Court does not address constitutional questions not brought before and directly addressed by the State courts. *Munks v. New Jersey,* 398 U.S. 71; 90 S. Ct. 1563; 26 L. Ed. 2d 54 (1970); *Street v. New York,* 394 U.S. 576; 89 S. Ct. 1354; 22 L. Ed. 2d 572 (1969); *Owens v. Norwood Lecy,* 5 Cranch. 330, 344 (1809); *Safeway Stores Inc. v. Oklahoma Retail Grocers Assoc. Inc.*, 360 U.S. 344 (1959). The constitutional claims of the Petitioner are entirely without merit, and were not preserved for appeal. They were never raised prior to this Petition. This Court does not consider issues that were never passed upon below.

The error alleged is that a doctor was not permitted to testify to a surgical procedure that she performed on Petitioner. Walsh ignores the fact that the doctor told the trial judge that she could not causally relate the surgery to the fall at Respondent's premises. Instead Walsh attempts to create a federal/state's right issue as to whether or not the physician had permission from her former employer, the Veteran's Administration, to render any opinions.

The second purported error is that though Petitioner could not elicit testimony from the doctor concerning the surgical procedure, the defense made reference to the procedure to rebut Petitioner's lost wage claim. There are no federal issues here, but merely evidentiary rulings that have been adequately addressed by the Florida courts.

I.

THE ISSUES RAISED BY PETITIONER IN PETITION FOR WRIT OF CERTIORARI WERE NOT PROPERLY PRESERVED FOR APPEAL.

As a threshold matter, the Petitioner has not preserved for review here the grounds upon which he now seeks review of the decision of the Supreme Court of Florida, Third District. As a general rule, this Court will not consider issues not passed upon below. *See, Singleton v. Wulff*, 428 U.S. 106 (1976). Justice mandates that the issue on appeal be raised below so as to ensure that litigants will have a full opportunity to develop and present all relevant facts and law so as not to be surprised on appeal by a final decision of issues which they have had no opportunity to defend. *Hormel v. Helvering*, 312 U.S. 552 (1941).

The constitutional inadequacies alleged by the Petitioner in Issue I of his Petition were never raised by the Petitioner at any time in this action's extensive procedural history. That the Petitioner has not prevailed on any of the substantive claims he has fully and fairly litigated indicates that the allegations have no support in law, and in no way justifies further expense of judicial resources litigating patently meritless due process and equal protection claims. It is an elemental concept of American jurisprudence that only the constitutional issues raised in lower courts are before the Supreme Court on appeal. *See, Shelley v. Kraemer*, 334 U.S. 1 (1948). This Court cannot decide issues for the first time on review of a state court decision. *See, Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

Having chosen not to do so, the Petitioner cannot, as a matter of law, now seek certiorari from this Court based upon his vague

and unsubstantiated assertions that his Fourteenth Amendment rights have been denied.

II.

THERE WAS NO ERROR IN THE TRIAL COURT'S EVIDENTIARY RULINGS.

The gravamen of Petitioner's argument is that the trial court made two erroneous evidentiary rulings. Unless this Court intends to usurp state evidence codes and state court interpretations of those codes, no federal claim has been made. It is submitted that even if the evidentiary rulings are wholly and entirely incorrect, this Court cannot address them. *See e.g. Green v. Neal's Lessee*, 6 Pet. 291 (U.S. 1825). Because this Court is bound by the decision of Florida's Third District Court of Appeal on the issues of Florida Law, *Jackson v. Chew*, 12 Wheat. 153 (U.S. 1827), petitioner has utterly failed to invoke this Court's jurisdiction under 28 U.S.C. § 1257. This case involves no Constitutional issues.

Walsh, a pro se litigant, totally ignorant of the Rules of Evidence, cannot comprehend that the same fact could be admissible for one reason, but inadmissible for another. Further any error is irrelevant because the evidentiary rulings affected the damages and the jury never reached that issue finding that Respondent was not negligent. Thus, even if the testimony that Walsh wanted the jury to hear was permitted into evidence, it could not have affected the outcome of the case.

A. The Court Properly Excluded the Doctor's Testimony.

Petitioner claims that the trial court improperly excluded the testimony of the Doctor who performed stomach surgery on him in April, 1991. The record reflects that there was a lengthy

discussion as to whether or not the doctor, employed at the time of the surgery by the federal government, could render a cause and effect opinion (an opinion that the fall at Respondent's facility was the reason the surgery was necessary) because the Veterans Administration took the position that their doctors could not render opinions. However, that issue was mooted when the doctor advised the court that even without such a prohibition she could not testify within a reasonable degree of medical probability that the stomach surgery was the result of the fall in November, 1989:

> THE COURT: So if I ordered you, not withstanding the VA instructions, to give us your opinion on whether there is causal relationship between the surgery that you did and the accident I gather that what you would say is that I cannot tell you within reasonable medical probability, meaning that there is greater than 50 percent probability that the surgery was caused by the accident. Is that a fair statement of where you are?
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> THE WITNESS: Yes.
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> THE COURT: Mr. Walsh, when we get to that point this doctor even if permitted to testify fully would not be able to give testimony that would support the admission into evidence of her testimony about the surgery because she cannot supply, even if I ordered her to testify over VA objections, she cannot testify to the threshold that you have to raise above to make her testimony admissible. So she is not going to able to testify unless you have some other expert witness who can come in and say that the

> surgery that was done by this doctor was caused by the accident that you had.

The Florida Evidence Code § 90.101 Florida Statutes (1991) *et seq.* is patterned after, and is similar to, the Federal Rules of Evidence. § 90.401 provides:

> DEFINITION OF RELEVANT EVIDENCE
>
> Relevant evidence is evidence tending to prove or disprove a material fact.

The doctor's testimony herein was totally irrelevant to the cause below. It would not have tended to either prove or disprove any material fact. That Walsh had stomach surgery nearly 18 months after the fall at the dog track was never questioned. However, the fact was irrelevant to the lawsuit as the doctor could not testify within a reasonable degree of medical probability, as she had to for her testimony to be admissible, that the accident necessitated the surgery. *Gooding v. University Hospital Building, Inc.*, 445 So. 2d 1015 (Fla. 1984). Therefore, since she could not opine within a reasonable degree of medical probability the trial court properly excluded her from testifying.

B. The Court Correctly Permitted Reference By the Defense of the Stomach Surgery.

Though Petitioner could not causally relate the stomach surgery to the accident, that does not mean that no reference to the surgery could be made during trial. Walsh attempted to exaggerate his damages by claiming lost wages for the period he was out of work because of the stomach surgery. Surely, there was no violation of his due process rights because the jury learned that the reason he was out of work in the Spring of 1991 was because he had stomach surgery unrelated to his fall in November, 1989 at

Respondent's premises. Evidence can be admissible for one reason and inadmissible for another. ***Barnett v. Butler***, 112 So. 2d 907 (Fla. 2d D.C.A. 1959). This proposition is applicable here. Walsh wanted to relate the surgery to the accident so that he could be compensated for the medical expense and related lost wages, but was unable to do so because the doctor did not believe the two events were related. Therefore, reference to the surgery during his case was properly excluded. Respondent made reference to the surgery for the purposes of defending the lost wage claim. Nothing more was done than advising the jury that one of the reasons Walsh lost time from work in 1991 was because of unrelated surgery. It would have been error to deny Respondent the right to so advise the jury.

C. Any Error was Harmless

Assuming *arguendo* that the court erred in either or both of the evidentiary rulings complained about by Petitioner, any such error was harmless and did not affect the outcome of the trial. Walsh lost the case. He failed to prove that the Respondent was negligent in maintaining the premises. He didn't know why he fell or if he tripped over his own feet. The jury found against him on liability. They never reached the damage issue. Therefore, whether or not there was any error is irrelevant as the two rulings affected the damage aspect of the case and not the liability aspect of the case. The jury never reached the issues of damages.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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